

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 21, 2008 Session

JEFFERY AARON LANE v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Sullivan County
No. C51,609 R. Jerry Beck, Judge**

No. E2007-00032-CCA-R3-PC - Filed February 2, 2009

The State appeals the Sullivan County Criminal Court's grant of post-conviction relief to Petitioner, Jeffery Aaron Lane, from his conviction for identity theft, a Class D felony. After a thorough review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Assistant District Attorney General, for the appellant, the State of Tennessee.

Jason R. McLellan, Kingsport, Tennessee, for the appellee, Jeffery Aaron Lane.

OPINION

I. Background

On November 9, 2004, Petitioner was indicted for one count of identity theft. On July 12, 2005, Petitioner entered into a negotiated plea agreement with the State in which he agreed to plead guilty to the charged offense in exchange for the State's recommended sentence of seven years as a Range II, multiple offender, with the manner of service of his sentence to be determined by the trial court. Following a guilty plea submission hearing, the trial court entered an order accepting Petitioner's plea of guilty. The trial court later conducted a sentencing hearing and imposed the recommended sentence of seven years to be served in confinement. It appears that no direct appeal was taken from this determination.

At the guilty plea submission hearing, the State informed the trial court that, had the case gone to trial, the evidence would have shown:

On or about August 19, 2004, Eric Sergeant, an officer with the Bristol[,] Tennessee Police Department, met with James Roy Forrester. Mr. Forrester lives in South Carolina and stated that he had gone to the South Carolina Department of Motor Vehicles in an attempt to get his Commercial Vehicle Operator's License and was informed by the South Carolina D.M.V. that he had driving under the influence convictions in Bristol, Tennessee, Sullivan County. Mr. Forrester was somewhat surprised by that as he had never been in Bristol, so Mr. Forrester contacted the Bristol[,] Tennessee Police Department to investigate the case. After listening to Mr. Forrester, Officer Sergeant obtained a color photograph at the Sullivan County Jail of the suspect that was arrested for D.U.I. and that D.U.I. was in . . . August 2004. Officer Sergeant compared the color photograph of the man that was arrested in 2000 with Mr. Forrester, who was standing in front of him, and in the photograph, the man looked nothing like him. They did have the same Social Security number, the same date of birth. The person who was arrested for the D.U.I. had been issued a Tennessee driver's license that showed that it was revoked, and it was in the name of James Roy Forrester, with that same Social Security Number and date of birth. The victim did not recognize the man, who had been arrested in 2000. Officer Sergeant then obtained a tag number of the vehicle that was being driven back in 2000, by the man claiming to be Mr. Forrester in a D.U.I. That registration came back to another man, who lived in South Carolina. Mr. Forrester, the victim, did not recognize the name of the vehicle owner either.

Officer Sergeant then contacted the F.B.I. and asked that the F.B.I. check the fingerprint card of the man who was arrested in August of 2000, claiming to be Mr. Forrester.

On August 31st of 2004, the F.B.I. issued a report or notified Officer Sergeant that the fingerprints had been matched to a Jeffrey Arron Lane, the Defendant here, and Mr. Lane was contacted on September 10, 2004, by Officer Sergeant and advised of his Miranda rights. Mr. Lane executed a waiver of those Miranda rights and gave a statement, wherein he admitted to using the name, James Roy Forrester, Mr. Forrester's Social Security Number and date of birth to secure a Tennessee driver's license and that it was he, in fact, who was arrested and convicted of driving under the influence in Sullivan County.

II. Post-Conviction Proceeding

Petitioner filed a petition for post-conviction relief alleging the ineffective assistance of trial counsel. Petitioner contended that the four-year statute of limitations applicable to the commencement of a Class D felony prosecution had expired at the time that the arrest warrant was issued on August 31, 2004. Petitioner argued that trial counsel's performance was thus deficient because he failed to move for a dismissal of the indictment because the indictment was untimely filed and because the indictment did not contain specific facts supporting the tolling of the statute

of limitations for the charged offense. Petitioner also alleged that his plea of guilty was involuntarily entered because he did not understand the nature and consequences of the plea.

It appears from the record that the post-conviction court conducted an evidentiary hearing on Petitioner's post-conviction petition on October 16, 2006, at which time the parties addressed Petitioner's issues concerning the statute of limitations. At some point, a video tape of the guilty plea submission hearing was played, after which the post-conviction court observed that the tape did not reflect that Petitioner had orally entered a plea of guilty at the submission hearing. A transcript of this first evidentiary hearing is not included in the record. We also observe that although the videotape of the hearing is not in the record on appeal, a transcript of the guilty plea submission hearing is included. Thereafter, Petitioner amended his post-conviction petition to argue that his conviction for identity theft is void because at no time during the guilty plea submission hearing did he knowingly and voluntarily enter a plea of guilty to the charged offense.

On December 13, 2006, the post-conviction court conducted a second evidentiary hearing. At this hearing, Petitioner acknowledged that he signed a Request for Acceptance of Plea of Guilty, which set forth his desire to plead guilty to one count of identity theft, a Class D felony, with a recommended sentence of seven years. Petitioner confirmed that trial counsel explained to him that he had the right to enter a plea of not guilty and proceed to trial at which time Petitioner could choose whether to testify. Petitioner acknowledged that trial counsel told him that Petitioner's request for alternative sentencing would be left to the determination of the trial court, and that his conviction for identity theft could be used to enhance any future punishment.

Petitioner acknowledged that at the guilty plea submission hearing, the trial court explained the elements of the charged offense and the range of punishment, and the constitutional rights which would be waived upon the entry of a plea of guilty. Petitioner informed the trial court that he understood the consequences of waiving those rights. Petitioner confirmed that he told the trial court that trial counsel had discussed the entry of a plea of guilty with him and that he was satisfied with trial counsel's assistance. In response to the trial court's question, "And is it your free and voluntary decision to plead guilty," Petitioner agreed that he stated "Yes, sir, your Honor." Petitioner stated at the evidentiary hearing that it was his understanding that he had pled guilty to the charged offense of identity theft at the conclusion of the guilty plea submission hearing,.

Petitioner acknowledged that he waived his Miranda rights and gave a statement to the police on September 10, 2004, following his arrest for identity theft. In his statement, Petitioner said that he resided in Easley, South Carolina. Petitioner stated that a friend had given him the name and social security number of James Roy Forrester, whom Petitioner believed was dead, so that Petitioner could obtain a Tennessee driver's license. At that time, Petitioner's South Carolina driver's license was in a revoked status. Petitioner stated that he used the name "James Roy Forrester" when he was arrested for DUI in Tennessee in August 2000, and that he continued to use this name when he returned to South Carolina after serving his sentence in Tennessee.

At the post-conviction hearing, Petitioner testified that he entered a plea of guilty on August 21, 2000, to one count of DUI in Tennessee. He was sentenced to eleven months, twenty-nine days, all of which was suspended after serving ten weekends in confinement. Petitioner acknowledged that he continually used the name “James Roy Forrester” throughout the court proceedings related to his DUI conviction and while serving his sentence in the Sullivan County Jail. Petitioner said that he provided the name “James Roy Forrester” and his South Carolina address to the Tennessee Board of Probation and Parole when the presentence report was prepared.

Petitioner denied that he had discussed the statute of limitations issue with trial counsel prior to the guilty plea submission hearing, and stated that he did not discover the issue until after he began serving his sentence for his identity theft conviction.

On cross-examination, Petitioner said that he met with trial counsel briefly on a few occasions in person and by telephone before the guilty plea submission hearing, and their discussions were “very short.” Petitioner acknowledged, however, that trial counsel went over the guilty plea request form with him. Petitioner said that if he had known that there was a statute of limitations issue, he would not have entered a plea of guilty. Petitioner stated that he was under duress at the time of the submission hearing because trial counsel told him that he would be sentenced to twelve years with a release eligibility of eighty-five percent if he did not enter a plea of guilty. Petitioner said that he was “scared to death.”

On redirect examination, Petitioner acknowledged that he told his probation officer that he resided in South Carolina with his girlfriend, daughter, and grandchild, and that he provided a copy of an electric bill charged to the South Carolina residence. Petitioner stated in the presentence report that he had been employed by Card Care Textile in Powdersville, South Carolina, from 1988 until 1994, when the facility closed. Petitioner began his own home improvement business in 1995, which he operated from his Easley, South Carolina home. Petitioner acknowledged that most of his prior convictions were incurred in South Carolina. Petitioner stated that he and his sister inherited a house in Tennessee in 1990 from his father, but he acknowledged that he did not include the house as an asset when he prepared his affidavit of indigency.

Trial counsel testified that he had practiced law for thirty years and had joined the Sullivan County Public Defender’s Office ten years prior to the evidentiary hearing. Trial counsel said that Petitioner approached him to discuss the case before his arraignment. Petitioner told trial counsel that he could not understand how he could be prosecuted for a crime in Tennessee that occurred years ago. Trial counsel told Petitioner that he believed that Petitioner’s residence in South Carolina would toll the statute of limitations, but he would have to verify that belief through research.

Trial counsel said that he was subsequently appointed to represent Petitioner and met with him several times to discuss the case. Trial counsel said that because Petitioner lived in South Carolina at the time, they only met personally on scheduled court dates. Trial counsel, however, said that he and Petitioner had several lengthy telephone conversations. On those occasions when trial counsel was not available to take Petitioner’s call, Petitioner left a South Carolina telephone number.

Trial counsel said that he discussed the statute of limitations issue with Petitioner two or three times. Trial counsel said that he believed that the State would offer Petitioner's out-of-state residency as support for the tolling of the statute, or, alternatively, that Petitioner had concealed his offense. Trial counsel was aware that the indictment did not set forth the specific facts supporting the tolling of the limitations period, but he advised Petitioner that if trial counsel filed a motion to dismiss the indictment on this basis, the trial court would probably grant the State's motion to amend the indictment to include such language. Trial counsel said that Petitioner chose to go forward with the indictment as written. Trial counsel stated that Petitioner did not tell him that he owned a house in Tennessee.

Trial counsel stated that he reviewed the guilty plea submission forms with Petitioner "line-by-line," and Petitioner did not express any reservations or concern about entering a plea of guilty. Trial counsel explained to Petitioner that the range of punishment for a Class D felony was between two and twelve years, and that it was possible that he could be sentenced as a Range III, persistent offender, based on his prior criminal record. Trial counsel also believed that with his lengthy criminal record, Petitioner would be in a better posture to seek a probated sentence if he entered a plea of guilty.

At the conclusion of the post-conviction hearing, the trial court found that Petitioner was using the name "James Roy Forrester" when he was arrested for DUI in Tennessee on August 16, 2000, and that Petitioner continued to use the name "James Roy Forrester" throughout the service of his sentence for this offense which expired in August 2001. Accordingly, the trial court found that the warrant for Petitioner's arrest dated August 31, 2004, was filed within the applicable four-year statute of limitations, and trial counsel's decision not to file a motion to dismiss was not deficient conduct.

The post-conviction court found, however, that the trial court erred in not requesting Petitioner to orally submit his plea of guilty in open court during the guilty plea submission hearing. The post-conviction court granted petitioner post-conviction relief on this issue and set aside his conviction for identity theft.

III. Standard of Review

A petitioner is entitled to post-conviction relief "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the

factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999); Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. Id. at 457.

IV. Analysis

The State argues on appeal that Petitioner has failed to show that his plea of guilty to the offense of identity theft was unknowing or involuntary “simply because the court did not conclude the hearing by asking him to repeat in a more express manner what [Petitioner] was clearly representing to the court throughout the hearing: that he wished the court to accept his guilty plea.” The State points out that Petitioner executed a request for acceptance of plea of guilty, that the trial court substantially complied with Rule 11 of the Tennessee Rules of Criminal Procedure during the guilty plea submission hearing, and that the trial court executed a written judgment finding Petitioner guilty of the charged offense and sentencing him as a Range II, multiple offender, to seven years of confinement.

“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 - 1712 (1969) (citing Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583 (1927)). Because the entry of a guilty plea involves the waiver of several constitutional rights, the trial court must question the defendant on the record to ensure that the defendant is knowingly and voluntarily entering the plea. Howell v. State, 185 S.W.3d 319, 331 (Tenn. 2006) (citing Boykin, 395 U.S. at 243-44, 89 S. Ct. at 1709; State v. Neal, 810 S.W.2d 131, 134-35 (Tenn. 1991), overruled in part on other grounds by Blankenship v. State, 858 S.W.2d 897 (Tenn. 1993); Tenn. R. Crim. P. 11(d)); see also Chamberlain v. State, 815 S.W.2d 534, 539 (Tenn. Crim. App. 1990) (holding that the defendant's execution of a request for acceptance of a plea of guilty does “not relieve the trial judge from addressing the [defendant] in open court as required by Rule 11(c)”).

The standard is and remains “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31 (1970); see also State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). “A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations ‘carry a strong presumption of verity.’” Marlon Charles Jones v. State, No. E2008-00520-CCA-R3-PC, 2008 WL 4735403, at *6 (Tenn. Crim. App., at Knoxville, Oct. 29, 2008), perm. to appeal filed (quoting Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977)).

As the State and Petitioner concede, the trial court in the case sub judice substantially complied with these requirements. However, as the trial court acknowledged after reviewing the tape of Petitioner's guilty plea submission hearing,

[l]ooking at it, the judge went through all the Rule 11 questions, Mackey questions. And it got to the point where the judge would say, "How do you plead, guilty or not guilty?" Somebody stood up, and we got to talking about the trial date or the alternative sentencing hearing date, and it was never done. I've never said "How do you plead, [Petitioner]?" And that's clear in the record.

Nor did the trial court orally "accept" a plea of guilty from Petitioner although he later executed a written order accepting Petitioner's plea of guilty. See Tenn. R. Crim. P. 11(4) (providing that "[i]f the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement").

Petitioner argues that his situation is similar to that presented in State v. Ellen Colleen Smith, No. E2004-02448-CCA-R3-CD, 2005 WL 2179578 (Tenn. Crim. App., at Knoxville, Sept. 9, 2005), no perm. to appeal filed. In this case, the defendant appealed her sentences for convictions on numerous counts of identity theft, forgery, and theft of property. Id., 2005 WL 2179578, at *1. In reviewing the defendant's challenge to the imposition of consecutive sentences, the panel of this Court addressed what it viewed as a more serious issue, that is, that the record did not show that the defendant had personally appeared in open court and entered her pleas of guilty to the charged offenses. Id.; see Tenn. R. App. P. 52(b). The defendant stated in her original appellate brief that "there was no plea colloquy whatsoever, but a sentencing hearing immediately followed by Defendant's signature on the guilty plea." In short, "the trial court simply forgot to do one." Ellen Colleen Smith, 2005 WL 2179578, at *3.

The panel observed that based on the record before it:

we cannot be certain which of the following three possible scenarios accounts for this failure: 1) the Defendant entered her guilty plea in open court and this proceeding was transcribed but not submitted to this Court; 2) a plea colloquy took place but was not transcribed; or 3) the trial court did indeed neglect to accept the Defendant's guilty plea and failed to conduct the required plea colloquy prior to sentencing. The record before us suggests the latter.

Id.

The panel concluded that if the defendant did not personally appear in open court to enter her pleas of guilty, and the trial court did not orally "accept" the defendant's pleas, the defendant's convictions would be void, stating:

[t]here is no evidence in the record before this Court that the Defendant was physically present at a guilty plea hearing to submit her guilty plea in open court. The plea of guilty, like the verdict of a jury, is itself a conviction. See Brooks v. State, 213 S.W.2d 7, 9 (Tenn. 1948). Obviously, if no guilty plea was entered by the Defendant, there was no conviction. If the trial court did not “accept” the Defendant’s guilty plea in her presence in open court, the resulting judgments of conviction are void.

Id., 2005 WL 2179578, at *5.

The record supports the post-conviction court’s finding that notwithstanding the trial court’s substantial compliance with Rule 11, Petitioner did not orally enter his plea of guilty to the charged offense of identity theft during the guilty plea submission hearing. Nor did the trial court “accept” Petitioner’s plea of guilty as required by Rule 11(4). Contrary to the State’s argument, it cannot be said that a trial court’s substantial compliance with the required advice to a defendant who is seeking to enter a plea of guilty dispenses with the need for the entry of the plea itself. It is a defendant’s entry of a plea of guilty and the trial court’s acceptance thereof upon which a conviction is based. Ellen Colleen Smith, 2005 WL 179578, at *5. A judgment for conviction of a crime cannot be based solely upon an intent to enter a plea of guilty. Accordingly, the trial court did not err in granting Petitioner post-conviction relief on this basis.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court granting Petitioner post-conviction relief and vacating Petitioner’s conviction.

THOMAS T. WOODALL, JUDGE